

QUESTIONS ARE IN BLUE. CANORRO'S ANSWERS APPEAR IN BLACK.

- **RE: INVESTIGATION REMOVED FROM ANALYST AND LACK OF A COMPLETED COMPLAINT INVESTIGATION:**

It doesn't seem to me that you have answered the question regarding why the investigation was removed from this Analyst. I have just been provided records from your office detailing that the investigation was removed from Ms. Hopkins and given to Gina and Katherine. In speaking with 6 former OMWBE Analysts regarding sending out letters of intent to remove for failure to provide documents, they all tell me this is a way to get a firm to cooperate. If the documents are not being provided, this is an established practice to warn the firm this is serious business and they need to supply the documents so the investigation can be completed. It is clear from the records disclosed to me by your office that after that letter was sent, this is exactly what occurred. The firm did supply documentation; yet just a few days later the investigation was removed. I know that you know the CFR's better than anyone, but in my reading of 49 CFR 26.87 it would appear the spirit and intent is that all of the records should be analyzed to wrap up an investigation.

The case was referred to the Certification Committee because the firm filed an appeal. That is standard practice. The analyst should not have had the file after the firm filed its appeal. Once a firm appeals, the process moves forward to the Certification Committee, despite what's contained (or lacking) in the intent to remove letter. You will have to ask the former OMWBE employee why she chose to issue an intent letter based upon a sole reason, failing to provide additional information. But you should know – last year, she and other management analysts were told not to submit intent to remove letters containing just a single reason. OMWBE's prior process of allowing analysts to review the Notice of Appeal and determine whether the Firm's reasons for appeal are sufficient to reverse the intent was discontinued as of June 11, 2011 when OMWBE adopted new appeal rules. This change made good sense as we found analysts were not timely responding and we were behind in processing appeals. We also learned from decisions remanded back from The USDOT Departmental Office of Civil Rights that it is inappropriate to use a single eligibility criteria and/or "failure to provide additional information" as the basis for removal of a DBE Firm. Moreover, recent training received from USDOT has informed us that once firm appeals, the case must go to the Certification Committee. Once the Firm submitted a timely appeal request, OMWBE was bound to proceed with the appeal process. OMWBE could not add other eligibility issues to the appeal proceeding.

Finally, if OMWBE's quality control had reviewed the intent to remove letter BEFORE it was issued, which is how the process is supposed to work, inquiries about the failure to complete the investigation report and why no onsite was done, would have been made and the file sent back to the analyst for further work PRIOR to issuance of the intent to remove letter. It is also likely that quality control would have picked up on a very important fact that you and the analyst overlooked – and that is OMWBE never assigned the Firm the North American Industry Classification (NAICS) code index entry necessary to be counted as a "condition of award" for concrete pumping as a DBE. The company is certified as a DBE and assigned NAICS Codes index entries for other concrete work. It is up to the awarding authority to determine whether the prime contractor is meeting its DBE requirements on projects – that is not the role of OMWBE. OMWBE simply determines whether a company meets the standards to be certified as a DBE for certain work

performed. And in this case, again, the Firm was never assigned the NAICS code index entry for concrete pumping. A Firm may only be counted toward DBE mandates when the Firm has the specific NAICS code index entry associated with the work description for which it is listed as a “condition of award.”

We fully intend to analyze all of the documents, as this investigation is not complete and ongoing.

Analysis of the records the Firm provided will be conducted during the renewal review of the firm, which will include completion of the investigation.

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

- Given this, and the information I have corroborated that Analysts commonly send out an intent to remove letter based on failure to turn over documents in an effort to pressure the firm to finally cooperate, can you please explain to me one more time, why the investigation was taken away from the Analyst and why, after the documents were provided, the investigation was never completed?

Again, analysts were informed not to continue that practice last year when our appeal process changed. Once the intent to remove letter was issued, the firm had the opportunity to appeal, and did. At that point, the process has to move forward and is referred to the Certification Committee. Because the Certification Committee can only use the information provided in the intent to remove letter, it is critical that analysts include all of the reasons why OMWBE has sufficient grounds to remove DBE certification status. It is inappropriate to use the removal letter process as a way to pressure firms. The investigation will be completed and the documents received from the firm will be reviewed as part of the renewal review of the firm.

- **RE: ISSUES CONSIDERED BY THE COMMITTEE**

As I understand from your answers below, the Cert. Committee is only at liberty to make decisions based on exactly what is in the intent to remove letter. In this case concrete pumping was not mentioned anywhere in the intent to remove letter, although it is the subject of the attachment to the letter sent to the firm which outlined the missing documents related to concrete pumping. Vicky has also responded to me agreeing with your response. This is a portion of her response:

The Committee has no authority to conduct its own investigation or to add additional issues that OMWBE did not include in its Intent to Remove Letter. 49 CFR Part 26.87(e) requires a separation of functions.

- I am confused by this. In reading the letter Vicky sent to the firm on 2/27/12, there are a few lines addressing 'Cooperation' (the issue raised in the intent to remove letter). There are four pages dedicated to 'Control-Independence'. Control-Independence issues were not raised in the intent to remove letter. And in the end the Committee ruled on concrete pumping by removing that from the firm's business description. Can you please explain this to me? Why am I being told that the Committee has no authority to add additional issues not included in the intent to remove letter, yet that is what happened in this case?

The Committee has no authority to address eligibility issues of which the Firm had no prior notice. The Committee may however, address technical matters as may be appropriate, as long as they do involve any additional eligibility issues. In this instance, the Committee merely directed OMWBE to align the firm's business description with the firm's already assigned NAICS codes index entries. OMWBE had not assigned the Firm the NAICS code index entry for concrete pumping. The business description didn't match the NAICS Code index entries. The Committee took the initiative to point out this error. There is nothing in the rules that prohibits the Certification Committee from doing this. This action by the Committee was not appealable by the Firm.

Overlooked in all the questions is the fact that the Certification Committee's determination regarding whether the Firm was cooperative is moot, because OMWBE never assigned the concrete pumping NAICS code index entry to the Firm.

- I am also aware from interviewing 6 former OMWBE analysts that the Committee routinely asks for additional information to make the best decision possible. Given that the analyst was trying to obtain documents in an effort to investigate if a pattern had been established by the firm regarding concrete pumping, and the Committee felt at liberty to rule on concrete pumping, why weren't more questions asked? Why wasn't additional information requested? Was the investigation stopped in an effort to keep the firm in the program?

As stated above, the investigation has not stopped; it will be concluded during the renewal review process.